

United States Senate
WASHINGTON, DC 20510

May 21, 2019

The Honorable R. Alexander Acosta
Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

RE: Notice of Proposed Rulemaking, RIN 1235-AA20, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees

Dear Secretary Acosta:

We write to express our strong opposition to the Department of Labor's (DOL) proposed rule to rescind the 2016 overtime rule and replace it with a rule that will leave millions of workers without overtime protection.

The overtime protections of the Fair Labor Standards Act (FLSA) ensure that employers do not overwork their employees, guaranteeing that workers are either paid for their long hours at work or are given more time with their families. The overtime protections also benefit workers more broadly, incentivizing employers to spread employment by hiring more workers rather than overworking current employees. Congress built into the FLSA a small exemption, however, for bona fide executive, administrative, and professional employees (EAP exemption), recognizing that this limited group of employees have enough individual market power to bargain for strong protections and compensation at work.

Since 1938, the Secretary of Labor has examined both an employee's duties and salary level in determining whether the employee is a *bona fide* executive, administrative, or professional employee. In a 1940 report, DOL stated that "The final and most effective check on the validity of the claim for exemption is the payment of salary commensurate with the importance supposedly accorded to the duties in question."¹ However, a failure to appropriately update the overtime regulations has resulted in the salary threshold reflecting not executive compensation, but poverty wages. In fact, the salary threshold is so out of step with historical norms that while in 1975 it covered 60 percent of salaried workers, today it covers just 7 percent.²

In 2004, DOL updated the overtime rules but made a fundamental error in doing so, raising the salary threshold for the first time since 1975 but also severely weakening the duties test. According to DOL itself, this resulted in the "inappropriate classification of employees as EAP exempt ..."³ That is why, just three years ago, DOL finalized its rule updating the overtime

¹ U.S. Department of Labor (DOL) Wage and Hour Division. "Executive, Administrative, Professional...Outside Salesman" Redefined, October 24, 1940.

² <https://www.epi.org/publication/trump-overtime-proposal-april-update/>

³ Defining & Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales & Computer Employees, 81 Fedd Reg. 32391, 32392 (May 23, 2016).

salary threshold, raising it from \$23,660 to \$47,476 per year, thereby restoring the value of the salary threshold. At \$47,476, the 2016 salary threshold covered one-third of full-time salaried workers and guaranteed overtime protections to 4.2 million workers.⁴

As DOL knows all too well, the 2016 threshold was carefully developed after a robust process of stakeholder engagement. DOL spent more than a year meeting with over 200 interested parties to obtain input before issuing a proposed rule in 2015; considered more than 270,000 comments received during the 60-day public comment period on the proposed rule; conducted extensive economic analysis on the costs and benefits to workers and employers; and made significant changes in response to public input before issuing the final rule.

However, DOL now proposes to rescind this rule and put in its place an alternative threshold of \$35,308 per year. At this level, the salary threshold would cover just 15 percent of full-time salaried workers and, according to DOL's own analysis, strip almost 3 million workers of their overtime protections.⁵ Additionally, according to the Economic Policy Institute, another 5 million workers who had their overtime protections strengthened by the 2016 rule will be left behind by DOL's proposed rule.⁶ All told, DOL's proposed rule will deprive workers of \$1.2 billion each year.⁷

DOL claims it is revisiting the rule due to the decision from the U.S. District Court for the Eastern District of Texas that claimed the rule was somehow beyond the Secretary's authority to create—a claim that several members of Congress rejected in a congressional amicus brief.⁸ However, DOL is disingenuous in acting as though rescinding the final rule and proposing a weak rule are its only options; DOL can, instead, defend both the 2016 rule and the Secretary's authority under the FLSA in court, completing the appeal of the court's decision to the 5th Circuit Court of Appeals that Secretary Perez began in 2016.

In order to preserve the overtime rights of nearly 3 million workers, defend the Secretary's authority under the FLSA, rebuild the middle class through the restoration of the 40-hour workweek, and live up to the legacy of Secretary Frances Perkins, DOL must withdraw its proposed rescission and rulemaking and, instead, defend the 2016 overtime rule in court.

Sincerely,



Sherrod Brown
United States Senator



Bernard Sanders
United States Senator

⁴ <https://www.epi.org/publication/trump-overtime-proposal-april-update/>

⁵ <https://www.epi.org/publication/trump-overtime-proposal-april-update/>; Defining & Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales & Computer Employees, 84 Fed Reg. 10900, 10951 (March 22, 2019).

⁶ <https://www.epi.org/publication/trump-overtime-proposal-april-update/>

⁷ <https://www.epi.org/publication/trump-overtime-proposal-april-update/>

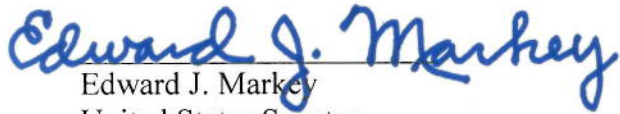
⁸ See *Nevada v. U.S. Dep't of Labor*, 275 F. Supp. 3d 795 (E.D. Tex. 2017); See amicus brief to the 5th circuit.



Richard Blumenthal
United States Senator



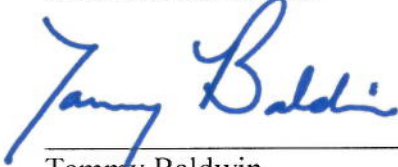
Kirsten Gillibrand
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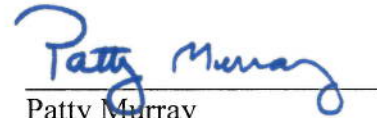
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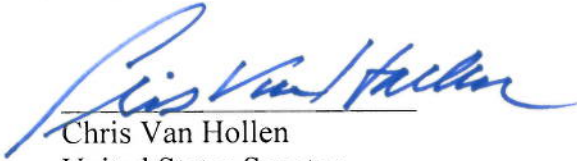
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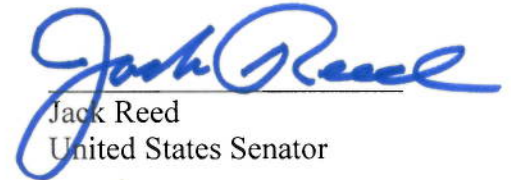
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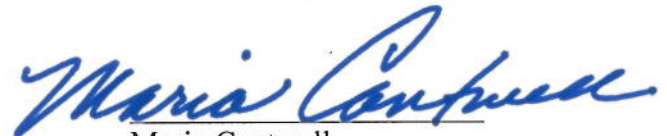
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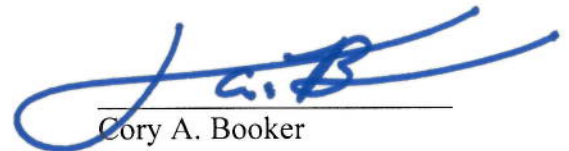
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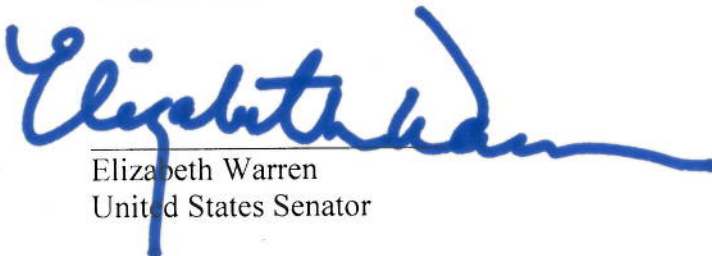
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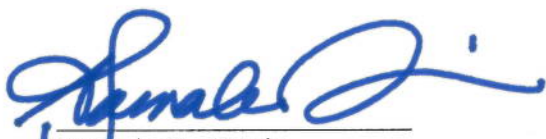
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